



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

St. Regis Mohawk Tribe v. Area Director, Nashville Area, Indian Health Service

Docket Nos. IBIA 99-40-A-EAJA, 00-57-A-EAJA, 01-88-A-EAJA (10/02/2002)

Related Indian Self-Determination Act decisions:

Health and Human Services Appeals Board decision, 01/17/2002

Health and Human Services Appeals Board decision concerning Equal Access
to Justice Act claim, 12/04/2002



**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS**

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October 2, 2002

ST. REGIS MOHAWK TRIBE,

Appellant

v.

AREA DIRECTOR,
NASHVILLE AREA
INDIAN HEALTH SERVICE,

Appellee.

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IBIA 99-40-A-EAJA
IBIA 00-57-A-EAJA
IBIA 01-88-A-EAJA
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Equal Access to Justice Act
(5 U.S.C. §504)
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AMENDED DECISION

Appearances: Geoffrey D. Strommer, Portland, Oregon, for Appellant
Marsha K. Schmidt, Washington D.C., for Appellant

Julia Pierce, Cassie Temple, Rockville, Maryland, for Appellee

Before: Administrative Law Judge Marcel S. Greenia

Based upon the Motion to Amend EAJA Judgment to include attorney fees incurred in pursuing the petition, filed on September 19, 2002 by Appellant, this Amended Decision modifies and supersedes the Decision issued on September 11, 2002.

This Decision addresses pending Appellant's Application for Attorneys' Fees and Expenses. The above entitled cases have been consolidated. The issue before this Tribunal is whether Indian Health Service's partial declination of the St. Regis Mohawk Tribe's proposed calendar year 1999, 2000, 2001 Annual Funding Agreements (AFA) pursuant to the Indian Self-Determination and Education Assistance Act (ISDEA) was substantially justified pursuant to 43 CFR §4.606. For the reasons set forth below, Appellant's Application for Attorneys' Fees and Expenses is granted.

Procedural History

Indian Health Service (IHS) through the Nashville Area Office partially declined the Tribe's Annual Funding Agreement when the Tribe requested to contract on a calendar year basis for years 1999, 2000, 2001. IHS argued that the payment of Headquarter (HQ) tribal shares should be made from IHS' federal fiscal year appropriations. Since the Tribe's contract began in January, three months of the fiscal year funding had been spent and the Tribe would receive fifteen months of funding. The Tribe appealed the decision of the IHS and the cases were consolidated for purposes of issuing a decision.

On October 23, 2001, a Recommend Decision was issued by this Tribunal granting the St. Regis Mohawk Tribe's (Tribe) Motion for Summary Judgment. On January 17, 2002 Health and Human Services, Departmental Appeals Board (DAB) affirmed the Recommended Decision. The DAB determined that the Tribe was entitled to be paid its HQ tribal shares in a single lump payment on a calendar year payment as provided by the Tribe's AFA.

The Tribe filed its Application for Attorneys' Fees and Expenses on February 19, 2002 requesting \$56, 226.29 in attorneys' fees and expenses. On March 19, 2002, the IHS filed its brief in opposition. The Tribe filed its response on April 10, 2002 and IHS filed a reply on April 30, 2002.

EAJA claims must be filed with thirty (30) days of a final disposition or final judgment. 5 USC §504(a)(2). As the DAB issued its final decision on January 17, 2002 this application is timely. 25 CFR §4.611 (b).

Discussion

1. Substantial Justification

There is no dispute that the Applicant satisfies the net worth eligibility standards or that the Applicant prevailed so that it is eligible to receive an award of fees and expenses. At issue is whether IHS' position was substantially justified.

To meet its burden of establishing that its position was substantially justified, IHS need only establish that its position had a reasonable basis both in fact and law. Bureau of Land Management v. Ericsson, 98 IBLA 253, 263 (1987). IHS will not be held to have acted without substantial justification merely because it lost in an administrative adjudication. Id. The government's burden of showing substantial justification for a case is not, however, insurmountable. S& H Riggers & Erectors, Inc. v. OSHRC, 672 F.2d 426, 430 (5th Cir. 1982). "The standard should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case." H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 10, 18: 1980 U.S. Code Cong. & Admin. News at 4989, 4997. However, "[a]n agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the [EAJA]." Bureau of Land Management v. Cosimati, 131 IBLA 390, (1995).

5 U.S.C. §554, which discusses and adopts the Equal Access to Justice Act (EAJA), provides:

Under the Act, an eligible party may receive an award for attorney fees and other expenses when it prevails over the Department in an adversary adjudication under 5 U.S.C. §554 before the Office of Hearings and Appeals, unless the Department's position was substantially justified or special circumstances make an award unjust.

The EAJA requires that (1) the claimant be a prevailing party; (2) the government's position was not substantially justified; (3) no special circumstances make the award unjust and (4) the request for fees be submitted within 30 days of final judgment and supported by an itemized statement. Commissioner, INS v. Jean, 496 U.S. 154, 158 (1990). The purpose of the EAJA is to eliminate legal expenses as a barrier to challenges of unreasonable government action. Community Heating & Plumbing Co. v. Garrett, 2 F.3d 1143 (Fed. Cir. 1993). Because the EAJA is a specific waiver of sovereign immunity, it is to be construed narrowly. Chiu v. United States, 948 F.2d 771 (Fed. Cir. 1991).

In the case at bar, the parties do not dispute that the Tribe is a "prevailing party" nor that the Tribe is otherwise EAJA eligible. Nor does IHS allege that the presence of "special circumstances" that would make the award unjust. 5 USC §554. Rather the resolution of this matter hinges upon whether IHS' position was "substantially justified".

The Supreme Court has defined "substantially justified" in the EAJA context as:

'justified in substance or in the main,' that is justified to a degree that could satisfy a reasonable person [which] is no different from the 'reasonable basis both in law and fact' formulation [heretofore] adopted by [many of the circuits].

Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490 (1988)(referring to Article III courts but outlining similar procedures for administrative EAJA cases). Congress adopted the "substantial justification" standard to "balance the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S.Code Cong. & Admin.News (96 Stat.) 4984, 4989. "While facilitating review of unreasonable governmental action, the conditional fee-shifting approach operates as a "'safety valve'...to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." *Id.* at 11, *reprinted in* 1980 U.S.Code & Admin. News at 4990.

To determine whether the government's position is justified a review of the merits of the underlying action is necessary. Kali v. Bowen, 854 F.2d 329, 332 (9th Cir. 1988). Here, the underlying action was IHS' failure to provide tribal Headquarter shares (HQ) on a full calendar year as contracted by the Tribe. Rather, IHS provided payment on a federal fiscal year appropriation.

The purpose behind the ISDEA was to protect the Tribe from delays with the federal appropriation process. Congress specifically provided a means by which IHS could transition the Tribe to a calendar year from a federal fiscal year and the Model Contract clearly delineated between a federal fiscal year and a calendar year. Even more telling, was the fact that IHS claimed it could not provide its HQ shares on a calendar year when it had been done on a Area Office Shares level whereby the tribal shares were paid out on a calendar year basis.

IHS argues in this appeal that its interpretation was reasonable because the language, and in particular, the use of the term “fiscal year” throughout the statute, and the legislative history are ambiguous and subject to two equally compelling interpretations. Justifying its actions, IHS focused on the fact that the Tribe has always been paid under a 12 month contract. However, this tribunal and the DAB rejected this position on the merits when it found the statutory and legislative intent behind the ISDEA provisions clearly identified a calendar year payment schedule as an option inuring to the tribes. The specific language of the ISDEA leaves it to the discretion of the Tribe to elect a calendar year or federal fiscal year funding for its self determination contracts.

IHS also reasons that government’s position is substantially justified as this is a matter of first impression. According to IHS, there is no established precedent or controlling legal authority to clearly determine the outcome of this controversy. But the language of the ISDEA is clear regarding the right of the Tribe to request that they be funded on a calendar year basis. *See* 25 U.S.C. §§450j(d) and 450l(c)(1)(b)(6). The legislative history, added to the statute in 1988, further supports the Appellant’s position by identifying that it was Congress’ intent to eliminate the problems tribes experience with federal fiscal year appropriations by providing for calendar year funding. S. Rep. No. 100-274 at 30, 100th Cong., 2d Sess. (1987), reprinted in 1988 U.S.C.C.A.N. 2620 at 2649. To determine whether a position is substantially justified is ascertained by whether the position is reasonable in law and fact, and not until the matter is tested in court or simply because the issue is never challenged. Preston v. Heckler, 596 F. Supp.1158, 1160 (D. Alaska 1984).

Recognizing that this case involved purely legal issues, where precedent was limited, it may be difficult for IHS to present extraneous circumstances going beyond the merits to justify its legal position. However, IHS lost on an issue of statutory interpretation that the DAB did not even consider close and without evidence otherwise explaining its position, it cannot be said that the government’s position was substantially justified.

Accordingly, it is this tribunal’s findings that the underlying position of IHS was not substantially justified.

2. Attorneys Fees

The EAJA requires this tribunal to award reasonable fees and expenses of attorneys. Reasonable attorneys’ fees “shall not be awarded in excess of \$125 per hour”. 5 U.S.C. § 504(b)(1)(A). 43 C.F.R. §4.607 governing EAJA applications allow a maximum attorney fee of \$75 per hour. IHS contends that the regulation requirement of \$75 per hour is the mandatory rate

to be paid. The Tribe requests application of the most recently amended statute authorizing a maximum of \$125 per hour. “[W]here there are discrepancies between a BIA regulation and a later enacted statute, the statute controls.” Connelly v. Acting Director, 35 IBIA 176 (2000); Collins v. Acting Director, 30 IBIA 165 (1997). Congress provided that the \$125 per hour attorney rate for civil actions and adversary adjudications shall be applied. *See* 5 U.S.C. §504 Note. Moreover, the Department of Health and Human Services recently published a Notice of Proposed Rulemaking to bring the EAJA regulations up to date, increasing the hourly rate to \$125. 67 Fed. Reg. 52696 (August 13, 2002). The comments to the proposed regulations notes that the since the statutory change, “...we have been processing fee applications under the current regulation except to the extent that the amended statute requires changes.” *Id.* at 52697.

Based upon the facts presented, the law firm’s skill and experience in the area of Indian Self Determination Act as well as the legislation, the rate of \$125 per hour constitutes a reasonable hourly rate for application here.

Next, IHS urges this tribunal to reduce the Tribe’s total recovery of attorneys’ fees. IHS argues that the Tribe’s hours are excessive, duplicative or otherwise unnecessary and consequently, unreasonable. It is IHS contention that the hours at issue resulted from supervision to oversee the work of differing attorneys assigned to the case. (IHS Response at 7, 9 and Exhibit D). IHS does not object to a division of labor but to a duplication of that labor when inexperienced or unfamiliar attorneys were assigned the case. The Tribe does admit that the reassignment of the case to several attorneys and the lack of experience of one person require that the fees should be reduced. Action on Smoking and Health v. CAB, 724 F.2d 211, 223 (D.C, Cir 1984). It is within this tribunal’s discretion to determine whether to provide for a reduction of fees and expenses. Hensley v. Eckhart, 461 U.S. 424 (1983).

A close review of the Tribe’s records indicates the validity of IHS’ argument. *See* Application for Attorneys Fees and Expenses Exhibit D Attachment 2. Examples of the type of duplicate billing is noted in many entries. On such entry dated August 2, 1999 indicates that CAJ received several calls from attorney MKS and several calls from GDS regarding the brief. MKS billed the same conversations on August 2, 1999 as did GDS. Three attorneys are working on the same draft of the brief. Action on Smoking and Health v. CAB, 724 F.2d 211, 223 (D.C. Cir. 1984) (reduction in fees is appropriate where the parallel full time work of two attorneys produced a single brief).

On entry January 7, 2002 notes CAJ working on the appeal brief, GDS reviewing it and meeting with CAJ regarding the work. On January 8, another attorney, HSA is editing the brief and on January 9, GDS is working on finalizing brief while on the same day HSA is researching and revising brief. Again three attorneys working on the same brief.

The billing records are replete with this type of duplication.. This tribunal recognizes that more than one attorney can be working on the same project. It would appear that the Tribe had certain inexperienced attorneys who needed more supervision than typical, thus requiring the work of two other attorneys to review and redraft the briefs. While team efforts is part of the process, the government is not obligated to pay for the teaching experience of an attorney.

In another example of unnecessary billing, IHS correctly points out that billing for research conducted on the Prompt Payment Act (PPA) is inappropriate. The federal government is not liable for interest except to the extent that it has waived sovereign immunity. This EAJA claim is a pre-award declination dispute; therefore, the interest provisions of the Contract Disputes Act of 1978 do not apply. The ISDEA incorporates the Prompt Payment Act, 31 U.S.C. §3901 et. seq. which indicates that the PPA does not authorize interest. *See* 25 U.S.C. §4501(c). Appellants have held themselves out as experts in the area of self determination contracts. *See* Appellant's EAJA Application at 5. Appellants billed approximately 19.3 hours of research time on PPA research. Consequently, \$2,412.50 (19.3 x \$125 per hour) is disallowed.

Because of the Appellant's billing is rife with efforts noted above, this tribunal, rather than attempting to sift through each billing entry to identify duplicative or unnecessary billing efforts, will reduce the Appellants' bill by twenty (20) percent in addition to the \$2,412.50 amount previously disallowed. Baldi Bros. Construction v. United States, 52 Fed Cl. 78 (2002); Naporano Iron & Metal Co. v. United States, 825 F.2d 403 (Fed Cir 1987).

3. Expenses

The EAJA requires that anyone seeking attorneys fees and expenses submit an itemized statement which sets out the actual time spent and the rate at which the fees were generated. 5 U.S.C. § 504. *See also* Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978). This also applies to the expenses incurred by the prevailing party.

"Contemporaneous records of attorney's time and usual billing rates, as well as a breakdown of expenses, are necessary in order to determine the reasonableness of the charges." Naporano Iron & Metal Co. v. United States, 825 F.2d 403, 405 (Fed. Cir. 1987). These contemporaneous records, moreover, must contain details of those expenses, identifying the specific task performed. *Id.* The decision to award costs is entirely within the tribunal's discretion. Neal & Co. v. United States, 121 F.3d 683, 687 (Fed. Cir. 1997).

The Applicant submits a summary of expenses. This summary fails to identify with any specificity the expenses allocated to the lawsuit. The only explanation provided by the Applicant for the lack of detail was the inability by the firm to break down costs and expenses according to the individual project. Consequently, the Applicant made a determination of how much of the bill for each month was dedicated to the appeal process in legal fees and applied that percentage to the costs. This is insufficient for the purposes of the EAJA and the awarding of expenses. Baldi Bros. Construction v. United States, 532 Fed. Cl. 78 (2002). Consequently, the Applicant's request for expenses in the amount of \$2,143.79 is denied.

Conclusion

This Tribunal finds that the Applicant is the prevailing party and the position of IHS was not substantially justified. A review of the Appellant's Application for Attorneys Fees and Expenses and the accompanying briefs reveal a billing record with some duplicative, unnecessary and not properly documented billing fees and costs. The Appellants admit that some of this was

due to lack of experience of attorneys working on the matter. As a result, it is determined that IHS should not be held liable for payment where such activity occurred.

Therefore, IHS will be responsible for payment to the Appellants of \$41,336.00. This amount is calculated on the total EAJA claim of Appellants \$56,226.29 less the expenses of \$2,143.79, less the \$2,412.50 (\$125 x 19.3 hours) research on the Prompt Payment Act, less 20% reduction for duplicative and unnecessary billing.

On September 19, 2002, Appellant filed a Motion to Amend EAJA Judgment to include fees incurred in pursuing the fee petition. The Supreme Court has held that an EAJA applicant is entitled to fees for preparation of the application. Commissioner, Immigration and Naturalization Service v. Jean, 496 U.S. 154 (1990). The Appellant asks for \$4,210.00 for their time expended on the EAJA appeal. The request is granted. Appellant will receive in addition to the fees allocated above, \$4,210.00 as requested, for a total of \$45,546.00.

//original signed

Marcel S. Greenia

Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal. The appeal must comply strictly with the regulations in 25 C.F.R. 900.165(b). Within 30 days of the receipt of this Decision, you may file an objection to the Decision with the Secretary of Health and Human Services under 25 C.F.R. § 900.165(b). An appeal to the Secretary under 25 C.F.R. 900.165(b) shall be filed at the following address: Departmental Appeals Board, U.S. Department of Health and Human Services, Room 637-D, Humphrey Building, 200 Independence Avenue, S.W., Washington D.C. 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to Secretary that you have served these copies. If neither party files an objection to the Decision within 30 days, the Decision will become final.